

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9754

File: 20-413532; Reg: 18086565

7-ELEVEN, INC., IQBAL KAUR, and SURINDER SINGH VIRK,
dba 7-Eleven Store #25115
552 California Boulevard,
San Luis Obispo, CA 93405,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 6, 2019
Ontario, CA

ISSUED JUNE 21, 2019

Appearances: *Appellants:* Donna J. Hooper, of Solomon, Saltzman & Jamieson,
as counsel for 7-Eleven, Inc., Iqbal Kaur, and Surinder Singh Virk,

Respondent: Sean Klein, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Iqbal Kaur, and Surinder Singh Virk, doing business as 7-Eleven Store #25115, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because they sold alcohol to two individuals under the age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated October 10, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 6, 2004. On February 27, 2018, the Department instituted a two-count accusation against appellants charging that on September 16, 2017, appellants' employee sold alcoholic beverages to two individuals who were under the age of 21.

At the administrative hearing held on June 12, 2018, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Lori Kohlman; by the two minors, Lauryn Brittain and Lindsay Peria; and by one of the licensees, Surinder Singh.

Testimony established that on September 17, 2017, the two minors and two of their friends entered the licensed premises and went to the coolers where they selected 18 6-ounce cans of Mike's Harder Lemonade and two bottles of Gatorade. They placed their selections in a basket and Ms. Brittain carried it to the register.

The clerk rang up the items then asked for Brittain's identification. She handed him a fake Colorado driver's license (exh. 3) which he attempted to scan, unsuccessfully. He told her the ID was not working and she replied, "that's weird, it should." She also stated that she was old enough to purchase alcohol. The clerk compared the information on the ID to Brittain, noting that the photo and other information matched her appearance, that it was not expired, and that the birth date indicated that she was old enough to purchase alcohol. He entered the birth date into the register, completed the sale, and placed the items into two bags.

Brittain picked up one bag, Peria picked up the other, and they exited the premises, followed by Agent Lori Kohman. Kohman and her partners contacted the two minors near their vehicle and identified themselves as ABC agents. When questioned,

Peria admitted that she was 18 years old and produced a valid California ID. Brittain, however, maintained that she was over 21, and showed them her fake Colorado ID — which contained her actual photograph, and correct physical descriptors.

Agent Kohman noticed that the ID was shiny, which in her experience indicated that the ID was fake. She also observed that the ID was too thick, and that the photo appeared to have been photoshopped onto the ID. After further questioning, Brittain admitted that she was 18 years old and she produced her Washington ID to confirm that fact.

The administrative law judge (ALJ) submitted his proposed decision on July 27, 2018, dismissing count one, pertaining to Peria, and sustaining count two of the accusation, pertaining to Brittain. He recommended a 20-day suspension. The Department adopted the proposed decision, but reduced the penalty to a 15-day suspension, in an Order dated September 28, 2018. A Certificate of Decision was issued on October 10, 2018.

Appellants then filed a timely appeal contending they reasonably relied on false identification presented by the minor.

DISCUSSION

Appellants contend the decision is not supported by substantial evidence because appellants reasonably relied on false identification — thereby establishing a complete defense under section 25660.

Section 25660 provides:

(a) Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, an identification card issued to a member of the Armed Forces that contains the name, date of birth, description, and picture of

the person, or a valid passport issued by the United States or by a foreign government.

[¶ . . . ¶]

(c) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

The burden in such a case is on the party asserting the defense.

In *Masani*, the court said:

The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted. A brilliant forgery should not ipso facto lead to licensee sanctions. In other words, fake government ID's cannot be categorically excluded from the purview of section 25660. The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance that includes careful scrutiny by the licensee.

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

(2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] (Masani).)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.²

Reasonable reliance on a fake ID cannot be established unless the appearance

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (5501 *Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (5501 *Hollywood*).)

Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*).) The statute provides an affirmative defense, and "[t]he licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660." (*Ibid.*)

The case law regarding section 25660 makes clear that to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra*; 5501 *Hollywood, supra*.) A licensee, or a licensee's agent or employee, must exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; 5501 *Hollywood, supra*.) Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (5501 *Hollywood, supra*, at pp. 753-754.)

Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact (*Masani, supra*, at p. 1445; 5501 *Hollywood, supra*, at pp. 753-754), and this Board may not go behind that factual

finding. The the standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Masani, supra*, at page 1437.)

In sum, the law requires three things to establish a defense under section 25660:

(1) that a clerk exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances, (2) that the person presenting the ID look like they could be 21, and (3) that the clerk make a reasonable inspection of the identification offered. As the court in *Masani* said, “[t]he licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted.” (*Masani, supra* at 1445.)

The ALJ relies entirely on the register's rejection of the ID when it was scanned and swiped in the register as the basis for rejecting appellants' 25660 defense. He states: “In general, valid IDs scan” and that “In general, valid IDs can be read when swiped.” (Findings of Fact, ¶ 7.) While we are unaware of any rule or case law that dictates that an out of state driver's license must be scannable or swipable to be valid, unfortunately the question of reasonable reliance is a question of fact, and the Board may not reevaluate the evidence to reach its own conclusion. As the Court in *Masani* admonished, the Board may not “reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although

perhaps equally reasonable, result.” (*Masani, supra*, at page 1437.)

In the instant case, the clerk checked to see if the person before him matched the photo on the ID, that the height, weight, eye color and hair color were correct, that it was not expired, and that the birth date indicated that she was over the age of 21. While we do concur with appellants that Brittain could pass for someone over the age of 21, this alone is not enough to establish a defense under section 25660. We agree with the ALJ that, in this case, a non-scannable, non-swipable ID should have alerted the clerk to the possible falseness of the offered identification, thereby making the clerk’s reliance on the fake ID less than reasonable.

ORDER

The decision of the Department is affirmed.³

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.